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# EIGHTH AMENDMENT PROPORTIONALITY IN THE AFTERMATH OF HARMELIN V. MICHIGAN

Edward J. McGowan

# EIGHTH AMENDMENT PROPORTIONALITY IN THE AFTERMATH OF *HARMELIN v. MICHIGAN*

"When a man causes a disfigurement in his neighbor, as he has done it shall be done to him, fracture for fracture, eye for eye, tooth for tooth; as he has disfigured a man, he shall be disfigured."[1]

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[2] Whether the prohibition of "cruel and unusual punishments" contains by implication a guarantee that the punishment must be proportionate to the offense, i.e., that it "fit the crime," is a question that has provoked widely diverse reactions from the Supreme Court in the past century.[3] In the recent case of *Harmelin v. Michigan*,[4] the Court held in a five to four decision that a state may impose life imprisonment without possibility of parole on a first offender for possession of 650 grams of cocaine.[5] The majority declared that such a sentence did not amount to cruel and unusual punishment.[6] In separate opinions, however, a bloc of three

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[1] *Leviticus* 24:19-20. By implicitly prohibiting the taking of *more* than an eye for an eye, the *lex talionis* is the first documented proportionality guarantee.

[2] U.S. CONST. amend. VIII.

[3] *See, e.g.*, Solem v. Helm, 463 U.S. 275 (1983) (the Eighth Amendment guarantees that noncapital sentencing cannot be disproportionate to the offense); Rummel v. Estelle, 445 U.S. 263 (1980) (federal courts should not examine whether a given sentence is proportional to the crime); Weems v. United States, 217 U.S. 349 (1910) (the Eighth Amendment prohibits excessive punishment); O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (the Eighth Amendment is directed against all punishments which by their excessive length or severity are greatly disproportionate to the offense charged) (Field, J., dissenting).

[4] 111 S. Ct. 2680 (1991).

[5] *Id.* at 2701-02.

[6] *Id.*

justices declared that such a sentence was not disproportionate to the offense,[7] and Justice Scalia, joined only by Chief Justice Rehnquist, maintained that no proportionality guarantee exists.[8] Consequently, the Court's previous opinion in *Solem v. Helm*,[9] which expressly determined that the Eighth Amendment guaranteed proportionality in noncapital sentencing, while not overruled, was left "eviscerated."[10] This Note provides an overview of proportionality jurisprudence, and argues that *Harmelin v. Michigan* renders the implications of the line of constitutional authority that preceded the opinion in doubt, furnishing no clear guidance for lower courts on how to analyze future Eighth Amendment challenges to the length of prison sentences.

## *I. Proportionality and The Eighth Amendment in Historical Perspective*

### *A. History of the "Cruel and Unusual Punishments" Clause vis à vis Proportionality*

In England at the turn of the millennium and for several centuries thereafter, the most common criminal punishment was not imprisonment, but the discretionary amercement.[11] An amercement was a mandatory amount of money or goods demanded in the king's name as punishment for some transgression -- the parallel of a modern fine.[12] By the thirteenth century excessive amercements were "so prevalent that three chapters of the Magna Carta[13] were devoted to their regulation."[14] Chapter 14 of the Magna Carta explicitly

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[7] *Id.* at 2702 (Kennedy, J., concurring). Justice Kennedy was joined in his opinion by Justices O'Connor and Souter. *Id.*

[8] *Id.* at 2686 (opinion of Scalia, J.).

[9] 463 U.S. 277 (1983).

[10] *Harmelin*, 111 S. Ct. at 2714 (1991) (White, J., dissenting).

[11] Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839, 845 (1969). *See also* Solem v. Helm, 463 U.S. 275, 284 n.8 (1983).

[12] Granucci, *supra* note 11, at 845 n.27.

[13] *See* J. C. HOLT, MAGNA CARTA 230 (1965).

[14] Granucci, *supra* note 11, at 845.

designated as fundamental law a prohibition of excessiveness in such punishments: "A free man shall not be amerced for a trivial offense, except in accordance with the degree of the offence."[15]

A fourteenth century document which purports to be a copy of the laws of Edward the Confessor[16] extended the policy of the amercements clause to cover physical punishments as well: "We do forbid that a person shall be condemned to death for a trifling offense. But for the correction of the multitude, extreme punishment shall be inflicted according to the nature and extent of the offense."[17]

For the majority of wrongdoers throughout the Middle Ages, prisons served only as waiting places pending some other, more fearsome, disposal.[18] Yet, as incarceration came into use as a criminal penalty in and of itself, at least one English court reiterated the proportionality principle and held that "imprisonment ought always to be according to the quality of the offence."[19]

Strangely, while proportionality had its roots in the infancy of English law, it was not until relatively recent times that England prohibited barbarous *methods* of punishments.[20] Although excessive punishments were prohibited by the Magna Carta, there apparently was no legal objection to particular modes of punishment, and as late as the mid-nineteenth century, heinous punishments were authorized for heinous crimes.[21]

Historical sources do not clearly resolve whether the framers of the American Constitution intended the Eighth Amendment to

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[15] J. C. HOLT, MAGNA CARTA 323 (1965).

[16] English king (1004 - 1066). THE CAMBRIDGE BIOGRAPHICAL DICTIONARY 464 (Magnus Magnusson ed., 1990).

[17] Granucci, *supra* note 11, at 846 (citing FAITH THOMPSON, THE FIRST CENTURY OF THE MAGNA CARTA: WHY IT PERSISTED AS A DOCUMENT 46 (1925)).

[18] *Sentences of Imprisonment: A Review of Maximum Penalties* (Report of the Advisory Council on the Penal System, London, Her Majesty's Stationary Office, 1978), *reprinted in* NICHOLAS N. KITTRIE & ELYCE H. ZENOFF, SANCTIONS, SENTENCING, AND CORRECTIONS 355 (1981).

[19] Hodges v. Humkin, 80 Eng. Rep. 1015, 1016 (K.B. 1615).

[20] Beheading and quartering were not abolished in England until 1870. 33 & 34 Vict., ch. 23, § 31 (1870) (Eng.).

[21] *See id*; *see also infra* notes 29-32 and accompanying text.

include a proportionality requirement.[22] The language of the Eighth Amendment is virtually identical to a provision of the English Bill of Rights of 1689.[23] One traditional view[24] regards the English provision as banning torture and barbarous punishments such as those imposed during the "Bloody Assizes" of Chief Justice Jeffreys.[25]

In 1685, James II succeeded his brother, Charles II, as the King of England.[26] Soon thereafter, Charles' bastard son, James, the Duke of Monmouth, launched an abortive rebellion.[27] In response, James II established a special commission to try the insurgents and he named Jeffreys as its director.[28]

Beginning in August of 1685, this commission, now known as the "Bloody Assizes," found hundreds of people guilty of treason.[29] The sentence imposed upon those convicted was the standard penalty for that offense at that time: the condemned man was dragged by a cart to the gallows, where he was hanged by the neck, cut down while still alive, disembowelled and his bowels burnt before him, and then beheaded and quartered.[30] Women found guilty

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[22] *See* Raoul Berger, *The Cruel and Unusual Punishments Clause, in* THE BILL OF RIGHTS 303, 305 (Eugene W. Hickok, Jr. ed., 1991) (there is no tradition of proportionality in either English or American law); Granucci, *supra* note 11, at 860-65 (the framers misinterpreted the English Bill of Rights and did not adopt the proportionality principle implicit in its punishments clause); Deborah A. Schwartz & Jay Wishingrad, Note, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783 (1975) (the framers recognized that the punishments clause barred disproportionate penalties but the judiciary misread their intent).

[23] The tenth declaratory clause of the English Bill of Rights of 1689 reads: "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted." 1 W. & M., Sess. 2, ch. 2 (1689) (Eng.).

[24] Note, *What is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54, 55 n.2 (1910).

[25] *Id.* George Jeffreys, the 1st Baron Jeffreys of Wem (1648-89), was an English judge. THE CAMBRIDGE BIOGRAPHICAL DICTIONARY 777 (Magnus Magnusson ed., 1990).

[26] Charles Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 378 (1980).

[27] *Id.*

[28] *Id.*

[29] Granucci, *supra* note 11, at 853-54.

[30] *Id.*

were simply beheaded or burned.[31]

> When [the Bloody Assizes] ended, scores had been executed and 1,260 were awaiting the hangman in three counties. . . . Mere death was considered much too mild for the villagers and farmers rounded up in these raids. The directions to a high sheriff were to provide an ax, a cleaver, 'a furnace or cauldron to boil their heads and quarters, and soil to boil therewith, half a bushel to each traitor, and tar to tar them with, and a sufficient number of spears and poles to fix their heads and quarters' along the highways. One could have crossed a good part of northern England by their guidance.[32]

Several commentators have attributed the Declaration of Rights provision outlawing cruel and unusual punishments to popular outrage against these aforementioned proceedings.[33]

In his widely cited article, Anthony Granucci[34] rejects the theory that the punishments clause in the English Bill of Rights was intended as a response to the Bloody Assizes.[35] Granucci argues instead that the punishments clause was a reaction to the punishment imposed on Titus Oates.[36] Oates, a minister, was convicted in 1685 of perjury during the reign of Protestant Charles II for falsely accusing several nobles of treason.[37] Oates was tried during the reign of Catholic James II and sentenced (coincidently by the same Chief Justice Jeffreys)[38] to a heavy fine, life imprisonment, whippings and

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[31] *Id.*

[32] Furman v. Georgia, 408 U.S. 238, 254 (1971) (Douglas, J., concurring) (quoting IRVING BRANT, THE BILL OF RIGHTS 154-55 (1965)).

[33] *See, e.g.*, RICHARD L. PERRY, SOURCES OF OUR LIBERTIES 236 n.103 (1959); Note, *What is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54, 55 (1910).

[34] Granucci, *supra* note 11.

[35] *Id.* at 856-59.

[36] *Id.* at 856-57.

[37] *Id.*

[38] *Id.*

pillorying four times a year, and defrocking.[39] Defrocking was a penalty only within the power of ecclesiastical courts at the time, and it was objected to on that ground.[40] Parliament denied Oates' petition for release; those who dissented labelled the punishment "cruel and unusual."[41]

This leads Granucci to conclude that the phrase "cruel and unusual" in the English Bill of Rights was not intended to outlaw barbarous punishments, but rather to object to penalties not authorized by law and as a reiteration of the English policy against disproportional punishments.[42] However, Granucci claims that the American framers misinterpreted the English meaning of "cruel and unusual punishments," and intended the Eighth Amendment to outlaw only barbarous *methods* of punishment.[43]

Little evidence exists recounting the debates on the adoption of the Eighth Amendment.[44] What material there is shows concern not with excessiveness, but with the mode of punishment. Patrick Henry,[45] at the Virginia Convention, lobbied for a bill of rights, and said:

> In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. . . . What has distinguished our ancestors? That they would not admit of torture or cruel and barbarous punishment. But Congress may introduce the practice of the civil law in preference to that of the common law . . . of

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[39] *Id.* at 858.

[40] Granucci, *supra* note 11, at 858.

[41] *Id.*

[42] *Id.* at 860.

[43] *Id.* at 860-65.

[44] *Id.*

[45] American patriot and orator (1736-99). THE CAMBRIDGE BIOGRAPHICAL DICTIONARY 698 (Magnus Magnusson ed., 1990).

torturing to extort a confession of the crime.[46]

In a similar vein, at the same convention, George Mason[47] also spoke of the need to prevent the government from using torture:

> For that one clause expressly provided, that no man can give evidence against himself; and that . . . in those countries where torture is used, evidence was extorted from the criminal himself. Another clause of the bill of rights, provided, that no cruel and unusual punishments shall be inflicted; therefore torture was included in the prohibition.[48]

The Eighth Amendment received virtually no attention during the House debates on the Bill of Rights.[49] However, at the time of its adoption, there was some recognition of the fact that the Eighth Amendment was a flexible interdiction that might change in meaning as the mores of society change.[50] One commentator noted that the general opinion at the time the Eighth Amendment was adopted was that it prohibited every punishment that was not "evidently necessary."[51]

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[46] 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION 447-48 (J. Elliott ed., 1901), *quoted in* Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 738, 828 n.216 (1975).

[47] American revolutionary statesman (1725-92). THE AMERICAN HERITAGE DICTIONARY 1443 (Second College ed. 1985).

[48] 3 THE PAPERS OF GEORGE MASON 1085 (R. Rutland ed., 1970).

[49] The entire deliberation amounts to less than one-half of one page of transcript. 1 ANNALS OF CONGRESS 754 (Joseph Gales ed., 1832).

[50] *Id.* Mr. Livermore of New Hampshire, albeit in opposing adoption of the Eighth Amendment, stated: "What is meant by the term excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine." *Id.*

[51] WILLIAM BRADFORD, AN ENQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA 4 (1793).

### *B. Pre-Harmelin Supreme Court Interpretation of the "Cruel and Unusual Punishments" Clause vis à vis Proportionality*

The first opportunity for the Supreme Court to interpret the punishments clause did not arise until 1866, seventy-five years after the adoption of the Eighth Amendment, in *Pervear v. Commonwealth*.[52] Significantly, *Pervear* involved a proportionality challenge to a sentence imposed by a state court.[53] The defendant had been convicted of selling liquor without a license, and was sentenced to pay a fifty dollar fine and serve three months in jail at hard labor.[54] The Court disposed of the appeal by holding that the Eighth Amendment did not apply to the states,[55] but nonetheless acknowledged the concept that punishments must be proportional by noting that there was "nothing excessive, cruel, or unusual" about the sentence.[56]

The next reference to proportionality in a Supreme Court case appears in Justice Field's dissent in *O'Neil v. Vermont*.[57] The petitioner was a New York liquor merchant who had been convicted of 457 counts of illegal sale of liquor to residents of Vermont.[58] He was sentenced to pay a fine of twenty dollars per offense plus prosecution fees and one month in jail or, in the alternative, to serve approximately seventy-nine years in prison at hard labor.[59] O'Neil attacked his conviction on commerce clause grounds, claiming that the Constitution prohibited Vermont from criminalizing the sale of goods to residents by a nonresident.[60] The Court dismissed O'Neil's appeal, holding that no federal question had been presented.[61]

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[52] 72 U.S. 475 (1866).

[53] *Id.* at 479.

[54] *Id.* at 480.

[55] *Id.*

[56] *Id.*

[57] 144 U.S. 323, 337-38 (1892) (Field, J., dissenting).

[58] *Id.* at 326.

[59] *Id.* at 326-27.

[60] *Id.* at 334.

[61] *Id.* at 331.

Justice Field dissented, arguing that the sentence violated the Eighth Amendment.[62] He interpreted the punishments clause as being directed not only against the infliction of torture, but against all punishments which by their excessive length or severity were greatly disproportionate to the offense.[63] Justice Field went on to add that "[t]he whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted."[64] Justice Field rejected the reasoning that O'Neil's sentence was warranted as a cumulative sentence for many separate offenses, because it "[w]as greatly beyond anything required by any humane law for the offences."[65]

*Weems v. United States*,[66] decided eighteen years later, is described in later decisions alternately as "the landmark case,"[67] and as a case that cannot be applied "without regard to its peculiar facts."[68] The petitioner in *Weems* was an official of the United States Government of the Philippine Islands.[69] Weems was convicted of falsifying a public document[70] and sentenced by a territorial court to fifteen years of *cadena temporal*.[71] The punishment called for incarceration at hard labor with chains fastened to the wrists and ankles at all times.[72] Additionally, the prisoner was permanently barred from holding any position of public trust, was subject to government surveillance for the rest of his life, and was stripped of "the rights of parental authority."[73]

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[62] *O'Neil*, 144 U.S. at 339 (Field, J., dissenting).

[63] *Id.*

[64] *Id.* at 340.

[65] *Id.*

[66] 217 U.S. 349 (1910).

[67] Furman v. Georgia, 408 U.S. 238, 324 (1972) (Marshall, J., concurring).

[68] Rummel v. Estelle, 445 U.S. 263, 274 (1980).

[69] *Weems*, 217 U.S. at 357.

[70] The statute Weems was convicted under was codified at the time as PHIL. PENAL CODE § 56. *Id.* at 358.

[71] *Id.* *Cadena temporal* is imprisonment for less than a life term. BLACK'S LAW DICTIONARY 203 (6th ed. 1990).

[72] *Weems*, 217 U.S. at 364.

[73] *Id.*

The Supreme Court reversed.[74] Justice McKenna, writing for the majority,[75] stated that the penalty "[i]s cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind."[76] This language indicates that it was the combination of an excessive but customary mode of punishment as well as its manifest brutality which made the punishment unconstitutional. The opinion cited both the *Pervear* Court's acknowledgement of proportionality[77] and Justice Fields' dissent in *O'Neil* with approval,[78] and noted that punishments like *cadena temporal* "amaze those who . . . believe that it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."[79]

The *Weems* Court rejected the interpretation that the Eighth Amendment proscribes only tortures like those employed in England during the late seventeenth century.[80] Justice McKenna wrote that "[the Eighth Amendment is] progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes

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[74] *Id.* at 382. The applicable provision of the Philippine Bill of Rights was determined to have the same meaning as the Eighth Amendment to the United States Constitution. *Id.* at 367.

[75] The majority of the Court consisted of four justices: Chief Justice Fuller and Justices Harlan, Day, and McKenna. Dissenting were Justices White and Holmes. Seven members heard the arguments, but Justice Brewer died before the decision was announced. *Weems,* 217 U.S. at 357 n.1. In his *Harmelin* opinion, Justice Scalia attempted to diminish the importance of the Court's decision in *Weems* by highlighting that it was decided by four justices; Harmelin v. Michigan, 111 S. Ct. 2680, 2699, 2700 n.13 (opinion of Scalia, J.). However, it is safe to assume that Justice Brewer was sympathetic to the rationale of the *Weems* Court, and would have been a fifth vote for reversal, since he had joined Justice Field in his dissent in *O'Neil.* Granucci, *supra* note 11, at 843.

[76] *Weems*, 217 U.S. at 377.

[77] *Id.* at 369 (citing Pervear v. Commonwealth, 72 U.S. 475 (1866)). *See supra* notes 52-56 and accompanying text.

[78] *Weems*, 217 U.S. at 369, 371 (citing O'Neil v. Vermont, 144 U.S. 323, 339 (Field, J., dissenting)). *See supra* notes 62-65 and accompanying text.

[79] *Weems*, 217 U.S. at 366-67.

[80] *See Weems*, 217 U.S. at 375-76 ("the prohibition against cruel and unusual punishment was not 'intended to warn against merely erratic modes of punishment or torture, but applied expressly to "bail", "fines" and "punishments."'") (quoting State v. Driver, 78 N.C. 423, 427 (1878)).

enlightened by a humane justice."[81]

Justice Edward White strenuously dissented.[82] Justice White argued that the history of the Eighth Amendment indicated that its purpose was the prohibition of barbarous methods of punishment, and, citing the trial of Titus Oates,[83] those punishments which were outside the jurisdiction of the sentencing court to impose.[84] Justice White saw no proportionality principles at work in the English Bill of Rights, noting the inherent ferocity of English methods of punishment which existed through the time of the American Revolution.[85] Justice White contended that the framers were entirely aware of the brutal character of prevailing English law, and nevertheless chose to duplicate the wording of the English Bill of

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[81] *Weems*, 217 U.S. at 378. In emphasizing the proposition that the framers could not have intended solely to "prevent an exact repetition of history," Justice McKenna set forth in one paragraph a justification for a progressive interpretation of the Eighth Amendment that subsequent cases on the same subject have not matched in clarity or eloquence:

> Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.

*Id.* at 373.

[82] *Id.* at 382 (White, J., dissenting).

[83] *See supra* notes 36-41 and accompanying text.

[84] *Weems*, 217 U.S. at 390 (White, J., dissenting).

[85] *Id.* at 393. Justice White chose "for the sake of brevity" not to review these punishments. *Id.* This virtue is not shared by the author of this Note: the burning of female felons was not outlawed until 1790, and certain male miscreants risked disembowelment until 1814. Granucci, *supra* note 11, at 856.

Rights.[86] Justice White concluded that the limitation of legislative discretion in the setting of criminal punishments violated "the elementary rules of construction."[87]

The Court's unanimous decision six years later in *Badders v. United States* [88] obscured the issue of *Weems*' breadth. In *Badders*, a defendant contested concurrent sentences of five years in prison and a $1000 fine on each of seven counts of mail fraud.[89] The Court barely acknowledged the Eighth Amendment challenge to the sentence, concluding that there was "no ground for declaring the punishment unconstitutional."[90] The Court employed no proportionality analysis at all, possibly, one commentator has noted, because the sentence did not appear to be disproportionate to the crimes involved.[91] In any event, the notion that *Weems* applies only to those punishments like *cadena temporal*, that are cruel, torturous, or barbarous in the method in which they are inflicted, seems to have begun with *Badders*.[92]

In *Trop v. Dulles*,[93] a plurality of the Court struck down forfeiture of citizenship as a penalty for wartime desertion because "the civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for a crime."[94] Although the rationale for the decision is vague, proportionality analysis is apparent in the plurality's flat rejection of the contention that the loss of citizenship was an excessive punishment in relation to the nature of the offense, since, the Court reasoned, wartime desertion was punishable by death.[95] The *Trop* Court agreed with the assertion in *Weems* that the Eighth Amendment is not static but

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[86] *Weems*, 217 U.S. at 394-95 (White, J., dissenting).

[87] *Id.* at 410.

[88] 240 U.S. 391 (1916).

[89] *Id.* at 393.

[90] *Id.* at 394.

[91] Nancy Keir, *Solem v. Helm: Extending Judicial Review Under the Cruel and Unusual Punishments Clause to Require "Proportionality" of Prison Sentences*, 33 CATH. U. L. REV. 479, 484 n.34 (1984).

[92] *Id.*

[93] 356 U.S. 86 (1958) (plurality opinion).

[94] *Id.* at 102.

[95] *Id.* at 99.

progressive, and stated that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[96]

The first case to find that a term of imprisonment could violate the Eighth Amendment was *Robinson v. California*,[97] where the defendant was convicted under a statute that made it illegal to be "addicted to the use of narcotics."[98] Because the statute was read as imposing criminal status without requiring criminal intent or a manifest act, the Court found imprisonment to be cruel and unusual.[99] It emphasized that judgments about proportionality cannot be made in a vacuum: "Imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[100]

In *Ingraham v. Wright*,[101] a case involving the constitutionality of corporal punishment, the Court held that the punishments clause limits criminal punishment in three ways: (1) it "imposes substantive limits on what can be made criminal and punished as such,"[102] (2) it proscribes the kind of punishment that can be imposed,[103] and (3) it prohibits excessive punishment.[104] That same year, in *Coker v. Georgia*,[105] the Court, in holding that death is a disproportionate punishment for rape and therefore cruel and unusual, defined punishment as unconstitutionally excessive "if it (1) makes no measurable contribution to acceptable goals of punishment and hence

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[96] *Id.* at 101.

[97] 370 U.S. 660 (1962). Moreover, *Robinson* affirmatively established the application of the cruel and unusual punishments clause to the states via the Fourteenth Amendment. *Id.* at 675.

[98] *Id.* at 660 (citing CAL. HEALTH & SAFETY CODE § 11721 (1962)).

[99] *Robinson*, 370 U.S. at 666, 667.

[100] *Id.* at 667.

[101] 430 U.S. 651 (1977).

[102] *Id.* at 667 (citing Robinson v. California, 370 U.S. 660 (1962)).

[103] *Ingraham*, 430 U.S. at 667 (citing Trop v. Dulles, 356 U.S. 86 (1958) (plurality opinion)).

[104] *Ingraham*, 430 U.S. at 667 (citing Weems v. United States, 217 U.S. 349 (1910)).

[105] 433 U.S. 584 (1977).

is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[106] Although *Coker* was a death penalty case, nothing in the *Coker* analysis suggests that the principles of proportionality are applicable solely to capital cases.[107]

In a five to four decision, the Court in *Rummel v. Estelle*[108] rejected the argument that a prison sentence, excessive in its term of years to the gravity of the underlying offense, constituted cruel and unusual punishment.[109] The opinion plainly stated that, except in extremely rare cases, federal courts should not examine whether a given prison sentence is proportional to the crime.[110]

Rummel was convicted under a recidivist statute that dictated a sentence of life imprisonment upon conviction of a third felony.[111] What made Rummel's case notable was the trifling nature of his prior offenses. Convicted of "obtaining $120.75 by false pretenses,"[112] Rummel had been convicted of similar felonies twice before, once for fraudulent use of a credit card in the purchase of goods worth $80, and for passing a forged check worth $28.36.[113] Nevertheless, Justice Rehnquist, writing for the Court, concluded that the statute was constitutional.[114] Outside the unique situations of the death penalty or the *cadena temporal* of *Weems*,[115] Justice Rehnquist wrote

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[106] *Id.* at 592.

[107] See also Enmund v. Florida, 458 U.S. 782 (1982), where the Court, in express reliance on proportionality principles, vacated the death sentence imposed on the nontriggerman participant in a felony that resulted in murder, where there had been no proof of an intent to kill on the part of the defendant. *Id.* at 795-96, 801. *Compare* Tison v. Arizona, 481 U.S. 135 (1987) (upholding the death penalty against defendant when participation in the felony results in murder and the defendant possesses the requisite mental state of reckless indifference).

[108] 445 U.S. 263 (1980).

[109] *Id.* at 284-85.

[110] *Id.* at 274.

[111] TEX. PENAL CODE ANN. art. 63 (Vernon 1925), *modified as* TEX. PENAL CODE ANN. § 12.42(d) (Vernon 1974). *See Rummel*, 445 U.S. at 264.

[112] *Rummel*, 445 U.S. at 266. The offense was codified as TEX. PENAL CODE ANN. art. 1410(b), *reprinted in* TEX. PENAL CODE ANN. app. at 688 (Vernon 1974). *See Rummel*, 445 U.S. at 266 n.5.

[113] *Rummel*, 445 U.S. at 265.

[114] *Id.*

[115] *See supra* note 71 and accompanying text.

that "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative."[116] Justice Rehnquist felt this conclusion was mandated at least in part because of the difficultly in developing objective judicial criteria for the determination of the proper length of a prison sentence.[117]

Rummel sought to prove the disproportionality of his sentence by showing the Court how he might have received a lighter sentence in almost any other jurisdiction.[118] The Court rejected this comparative analysis, pointing out that state-to-state variations on parole eligibility complicated any comparison of sentences actually given.[119] In addition, Justice Rehnquist stressed that interjurisdictional evaluation trampled on conventional federalist principles: "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State."[120] In response to a hypothetical proposed by the dissent,[121] however, Justice Rehnquist retreated, and conceded in a fateful footnote that "[t]his is not to say that a proportionality principle would not come into play . . . if [for example] a legislature made overtime parking a felony punishable by life imprisonment."[122]

*Hutto v. Davis*,[123] decided by the Supreme Court two years later, is significant less for its affirmance of *Rummel* than for an

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[116] *Rummel*, 445 U.S. at 274.

[117] *Id.* at 275.

[118] *Id.* at 277.

[119] *Id.* at 280. The Court found it significant that under Texas' "relatively liberal" parole policy, Rummel could become eligible for parole "in as little as twelve years." *Id.*

[120] *Id.* at 282.

[121] *Rummel*, 445 U.S. at 288 (Powell, J., dissenting).

[122] *Id.* at 274 n.11. Footnote 11 created a critical inconsistency in Justice Rehnquist's opinion, since once the allowance is made that there are prison sentences that could be unconstitutionally disproportionate, it is no longer logical to assert that "the length of the sentence actually imposed is purely a matter of legislative prerogative." *Id.* *See supra* note 116 and accompanying text.

[123] 454 U.S. 370 (1982) (per curiam).

illustration of the initially recalcitrant attitude on the part of lower federal courts when it came to following *Rummel*. The respondent had been convicted in a Virginia state court of possession with intent to distribute and distribution of nine ounces of marijuana and was sentenced to forty years in prison.[124] The district court, on habeas corpus review, held that the punishment was cruel and unusual.[125] This decision predated *Rummel* by three years.

The district court in *Davis* relied on a four element test provided by an earlier Fourth Circuit case, *Hart v. Coiner*.[126] The *Hart* test looked at the following factors to determine whether a term of imprisonment was violative of the Eighth Amendment: First, the nature of the offense, i.e., its violence or nonviolence; second, the legislative purpose behind the choice of the particular punishment prescribed for the offense; third, an examination of punishments levied for the same crime in other jurisdictions; and lastly, a comparison of other penalties assessed for other crimes in the same jurisdiction.[127] The Court of Appeals, sitting en banc the year after *Rummel*, affirmed *Davis*,[128] including, by implication, the lower court's reliance on *Hart*.

The Supreme Court reversed in a sharply worded per curiam opinion, "[b]ecause the Court of Appeals failed to heed our decision in *Rummel*."[129] In another footnote, however, the Court acknowledged a continuing concern with the *Rummel* overtime

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[124] *Id.* at 371.

[125] Davis v. Zahradnick, 432 F. Supp. 444, 453 (W.D.Va. 1977), *rev'd sub nom.* Davis v. Davis, 585 F.2d 1226 (4th Cir. 1978), *aff'd*, 601 F.2d 153 (4th Cir. 1979) (en banc), *vacated sub nom.* Hutto v. Davis, 445 U.S. 947 (1980), *aff'd sub nom.* Davis v. Davis, 646 F.2d 123 (4th Cir. 1981) (en banc) (per curiam), *rev'd sub nom.* Hutto v. Davis, 454 U.S. 370 (1982).

[126] 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 938 (1974).

[127] *Hart*, 483 F.2d at 140-42. A slightly modified version of the *Hart* test was also proposed by the dissenters in *Rummel*. *Rummel*, 445 U.S. at 295 (Powell, J., dissenting).

[128] Davis v. Davis, 646 F.2d 123 (4th Cir. 1981) (en banc) (per curiam), *rev'd sub nom.* Hutto v. Davis, 454 U.S. 370 (1982) (per curiam). The Supreme Court had originally remanded to the Fourth Circuit to reconsider the case in light of *Rummel*. Hutto v. Davis, 445 U.S. 947 (1980).

[129] *Hutto*, 454 U.S. at 372.

parking hypothetical,[130] this time with a somewhat more generous wording: "We noted in *Rummel* that there could be situations in which the proportionality principle *would* come into play, *such as* 'if a legislature made overtime parking a felony punishable by life imprisonment.'"[131]

Just three years after *Rummel*, in *Solem v. Helm*,[132] the Court in a five to four decision expressly adopted the proportionality principle and applied a slightly modified version of the *Hart* test to facts similar to those before the Court in *Rummel*. The defendant in *Solem* was convicted of passing a bad check for $100,[133] an offense which carried a maximum penalty of five years in prison and a $5000 fine if it had been a first offense.[134] Because of a prior criminal record,[135] however, Helm was sentenced pursuant to a South Dakota recidivist statute[136] to life imprisonment without parole.[137] Justice Powell, who wrote the dissent in *Rummel*, wrote for the majority in *Solem*, and emphasized that a critical distinction between the two cases lay in the fact that Rummel's life sentence carried with it the

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[130] *Rummel*, 445 U.S. at 274 n.11. *See also supra* note 122 and accompanying text; *Hutto*, 454 U.S. at 374 n.3.

[131] *Hutto*, 454 U.S. at 374 n.3. (emphasis added) (citations omitted); *see also* Harmelin v. Michigan, 111 S. Ct. 2680, 2685 (1991) (opinion of Scalia, J.).

[132] 463 U.S. 277 (1983).

[133] *Id.* at 281.

[134] S.D. CODIFIED LAWS ANN. § 22-6-1(7) (1979).

[135] Helm had six prior convictions which the Court characterized as nonviolent felonies, including three for third degree burglary and one for driving while intoxicated. *Solem*, 463 U.S. at 279-80.

[136] S.D. CODIFIED LAWS ANN. § 22-7-8 (1979) (amended 1981). The statute provided that a defendant convicted of a fourth felony faced a sentence enhanced to the penalty provided for a "Class 1 felony." *Id.* A Class 1 felony in South Dakota carried a maximum sentence of life imprisonment. S.D. COMP. LAWS ANN. § 22-6-1(2) (1967 ed., Supp. 1978) recodified as S.D. CODIFIED LAWS ANN. § 22-6-1(3) (Supp. 1982). *See Solem*, 463 U.S. at 281-82.

[137] Helm was not ineligible for parole simply because he was convicted under the recidivist statute. Under South Dakota's sentencing scheme any prisoner serving a life sentence was ineligible for parole. S.D. CODIFIED LAWS ANN. § 24-15-4 (1979). *See Solem*, 463 U.S. at 282.

possibility of parole, and Helm's did not.[138]

This distinction permitted the Court to maintain that it was not overruling *Rummel*, but was instead comporting with it. In the Court's view, *Solem's* holding flowed logically from its pre-*Rummel* opinions, citing *Weems*, *Trop*, *Robinson*, *Coker*, and *Ingraham* among others.[139] Justice Powell then pointed out that *Rummel* itself acknowledged a proportionality principle in the overtime parking footnote,[140] as well as in its statement that "one could argue . . . [that] the length of [the] sentence actually imposed is purely a matter of legislative prerogative."[141] By emphasizing the words *one could argue*, Justice Powell proposed that "[t]he Court [in *Rummel*] did not adopt the standard proposed, but merely recognized that the argument was possible."[142] He then added that "[t]o the extent that the State . . . makes this argument here, we find it meritless."[143]

The Court then provided a three-part proportionality test, and held that the relevant factors to be considered might include: (1) the nature of the offense and the severity of punishment; (2) the penalties prescribed in the same jurisdiction for other, more serious, offenses; and (3) the punishments imposed in other jurisdictions for the same

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[138] A look at the way the Justices voted in each case may suggest a simpler reason for the shift in the two decisions: Justice Blackmun simply changed his mind. In *Rummel*, Chief Justice Burger and Justices Stewart, White, Rehnquist, and Blackmun were the majority. Rummel v. Estelle, 445 U.S. 263, 264 (1980). Justices Powell, Brennan, Marshall, and Stevens dissented. *Id.* at 285. In *Solem*, Justices Brennan, Marshall, Powell, Blackmun, and Stevens were the majority. *Solem*, 463 U.S. at 277. Chief Justice Burger and Justices White, Rehnquist, and O'Connor dissented. *Id.* at 304. Justice Blackmun wrote no concurrence in *Solem* to explain why he changed his vote.

Shifting positions are not uncommon on the issue of proportionality. Justice White opposed recognition of a proportionality principle in both *Rummel* and *Solem*, yet wrote a blistering dissent to *Harmelin* in strong support of the *Solem* test. Harmelin v. Michigan, 111 S. Ct. 2680, 2709 (1991) (White, J., dissenting).

[139] *Solem*, 463 U.S. at 286-89.

[140] *Id.* at 288 (citing *Rummel*, 445 U.S. at 274 n.11). *See supra* note 122 and accompanying text. The dissenters in *Solem* conceded that *Rummel* and *Davis* "leave open the possibility that in extraordinary cases . . . it might be permissible for a court to decide whether the sentence is grossly disproportionate to the crime." *Solem*, 463 U.S. at 311 n.3 (Burger, C.J., dissenting).

[141] *See supra* note 116 and accompanying text.

[142] *Solem*, 463 U.S. at 288-89 n.14.

[143] *Id.* at 288-89.

offense.[144] After noting that "no one factor will be dispositive in a given case,"[145] the Court concluded after application of these factors to Helm's sentence that it violated the Eighth Amendment.[146]

The *Solem* Court stressed that it was not adopting a general rule of appellate review of all prison sentences.[147] Courts were still required to "grant substantial deference"[148] to legislative determinations and trial court judgments when considering a proportionality challenge.[149] In the view of the *Solem* Court, however, such deference should not prevent courts from determining that a sentence is so disproportionate as to give rise to an Eighth Amendment claim.[150]

## *II. Harmelin v. Michigan*

### *A. The Facts*[151]

In the early morning hours of May 12, 1986, in Oak Park, Michigan, two police officers stopped Ronald Harmelin for failing to make a complete stop at a red light.[152] After producing his driver's license and vehicle registration, Harmelin informed the officers that he was carrying a pistol in an ankle holster.[153] Harmelin then produced a valid permit to carry a concealed weapon.[154] Ultimately, Harmelin was searched and the officers discovered in his pockets

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[144] *Id.* at 290-92.

[145] *Id.* at 291 n.17.

[146] *Id.* at 303.

[147] *Id.* at 290 n.16.

[148] *Solem*, 463 U.S. at 290.

[149] *Id.*

[150] *Id.*

[151] Except where otherwise noted, the facts are those provided by Brief for the Petitioner at 2-4, Harmelin v. Michigan, 111 S. Ct. 2680 (1991) (No. 89-7272) [hereinafter Harmelin's Brief]. Respondent accepted Petitioner's account of the facts as they were presented in Petitioner's brief. Brief for Respondent at 1, Harmelin v. Michigan, 111 S. Ct. 2680 (1991) (No. 89-7272).

[152] Harmelin's Brief, *supra* note 151, at 2.

[153] *Id.*

[154] *Id.*

some marijuana cigarettes, assorted pills, ten small packets of cocaine, three small vials of cocaine, and a beeper.[155] Harmelin was then placed under arrest. In stark contrast to defendants Rummel and Helm, Ronald Harmelin had never been in trouble with the law.[156]

Later, the police impounded Harmelin's 1977 Ford and searched the trunk.[157] The search revealed a closed travel bag. Inside the travel bag was a closed shaving kit bag containing $2900 and two bags containing 672.5 grams of cocaine.[158]

After a bench trial, Harmelin was convicted of possession of more than 650 grams of cocaine[159] and possession of a firearm during

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[155] *Id.*

[156] William Rummel and Jerry Helm had ten felony convictions between them. *See supra* notes 113 & 135 and accompanying text. This was Ronald Harmelin's first arrest. Letter from Ronald Harmelin to Edward McGowan 1 (Oct. 16, 1991) (on file with the *New York Law School Journal of Human Rights*). *See also Michigan Department of Corrections Presentence Investigation Report, reprinted in* Joint Appendix, Briefs for the Petitioner and the Respondent, Harmelin v. Michigan, 111 S. Ct. 2680 (1991) (No. 89-7272).

[157] Harmelin's Brief, *supra* note 151, at 2.

[158] *Id.* Six hundred and seventy-two grams equals roughly one and one-half pounds. Undeniably a large amount of cocaine, it nonetheless merits emphasis that evidence indicated that Harmelin was merely a "mule," or carrier, and not a "kingpin." His only assets at the time of his arrest were $597 and his nine year old car. While Harmelin's fingerprints were found on a book inside the travel bag, they were not found inside the shaving kit bag that contained the money and cocaine. Harmelin's Brief, *supra* note 151, at 3-4.

[159] MICH. COMP. LAWS § 333.7403 (Supp.1990-1991) provides in pertinent part:

> (1) A person shall not knowingly or intentionally possess a controlled substance . . .
> (2) A person who violates this section as to:
> (a) A controlled substance . . . and:
> (i) Which is in an amount of 650 grams or more of any mixture containing that controlled substance is guilty of a felony and shall be imprisoned for life.

*Id.*

Ironically, the legislative history of the statute shows that its intended targets were recidivist drug dealers and kingpins. *See* Harmelin's Brief, *supra* note 151, at app. 5. Between its enactment in 1978 and late 1990, 123 people were sentenced to life

the commission of a felony.[160] The sentence authorized by statute for the drug possession was mandatory; the sentencing judge had no discretion in its imposition and was not permitted to take into consideration the circumstances of the crime or the fact that this was Harmelin's first offense.[161] On April 30, 1987, Ronald Harmelin was sentenced by Judge Schnelz of the Oakland County Circuit Court to a term of life imprisonment without possibility of parole for the drug possession,[162] and a two year term for the firearm conviction.[163]

Harmelin appealed his conviction on several grounds,[164] including a two-pronged Eighth Amendment claim -- first, that a sentence of life without parole was unconstitutionally disproportionate to the seriousness of his crime,[165] and second, that it was cruel and unusual to impose such a sentence without consideration of mitigating factors.[166] In affirming the sentence, Michigan's Court of Appeals

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without parole under the statute, and of that number almost half were first time offenders. Ruth Marcus, *Life in Prison for Cocaine Possession? High Court Weighing Strict Michigan Law*, WASH. POST, Nov. 5, 1990, at A1. Most of the narcotic offenders sentenced under the law were not drug kingpins, but comparatively minor figures. Aaron Epstein, *Supreme Test for No-Parole Law: Justices Ask Tough Questions as Michigan Dealer Appeals Life Sentence*, DET. FREE PRESS, Nov. 6, 1990, at 1B.

[160] MICH. COMP. LAWS § 750.227(2) (West 1991).

[161] *See supra* note 156 and accompanying text.

[162] MICH. COMP. LAWS § 791.234(4) (West 1991) makes clear that a person convicted of possessing this amount of a controlled substance is ineligible for parole. The statute provides in pertinent part:

> A prisoner under sentence for life or for a term of years *other than . . . prisoners sentenced for life or for a minimum term of imprisonment for a major controlled substance offense*, who has served 10 calendar years of the sentence is subject to the jurisdiction of the parole board and may be released on parole.

*Id.* (emphasis added). MICH. COMP. LAWS § 791.233b[1](b) defines a "major controlled substance offense" as, *inter alia*, a violation of § 333.7403, the possession statute. *See supra* note 159.

[163] Harmelin's Brief, *supra* note 151, at 2.

[164] In addition to his Eighth Amendment claim, Harmelin contended that the searches of his car and his person violated the Fourth Amendment, and that he was deprived of effective assistance of counsel at trial. People v. Harmelin, 440 N.W.2d 75, 79-80 (Mich. Ct. App. 1989), *aff'd*, 111 S. Ct. 2680 (1991).

[165] Harmelin's Brief, *supra* note 151, at 8.

[166] *Id.*

addressed Harmelin's Eighth Amendment argument with only two words: "We disagree."[167] The Supreme Court of Michigan denied leave to appeal,[168] and the Supreme Court of the United States granted certiorari.[169]

### *B. The Decision*

The Court, in a five to four decision, held that Harmelin's sentence did not violate the Eighth Amendment; that "[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense . . . ."[170]

*Harmelin v. Michigan* is an unusually structured decision. Justice Scalia announced the judgment of the Court, in which Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Souter joined.[171] Before reaching the holding, however, Justice Scalia, joined only by the Chief Justice, set out in twenty pages of what can only be termed preambulatory dicta the view that the Eighth Amendment contains no proportionality guarantee, that *Solem* was incorrectly decided, and that what is cruel and unusual punishment should be determined without reference to the particular offense.[172] Justices O'Connor, Kennedy, and Souter, the largest bloc of Justices to hold that Harmelin's sentence was constitutional albeit for entirely different reasons, then concurred in the judgment announced by Justice Scalia and Chief Justice Rehnquist.[173] The lopsided structure of the opinion gives rise to the suspicion that there may have been late defections from what may have originally been slated as a majority opinion.

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[167] 440 N.W.2d 75, 80 (Mich. Ct. App. 1989), *aff'd*, 111 S. Ct. 2680 (1991).

[168] People v. Harmelin, 434 Mich. 863 (1990).

[169] 110 S. Ct. 2559 (1990). The Court limited the writ to the Eighth Amendment issue. *Id.*

[170] Harmelin v. Michigan, 111 S. Ct. 2680, 2701 (1991).

[171] *Id.* at 2683.

[172] *Id.* at 2680-2702 (opinion of Scalia, J.)

[173] *Id.* at 2702 (Kennedy, J., concurring).

### *i. Justice Scalia's Opinion*

Justice Scalia's opinion is essentially a restatement of the dissent in *Weems* -- that the Eighth Amendment applies to the mode of punishment only, not the degree to which it is imposed.[174] He began his opinion with a recap of the *Rummel*, *Davis*, and *Solem* holdings, with particular attention paid to correcting the subsequent manifestations of the *Rummel* footnote[175] and Justice Powell's reading of the "one could argue" passage.[176] Pointing out the Court's newly proclaimed freedoms when dealing with five to four decisions and the lessened applicability of stare decisis to constitutional precedents,[177] Justice Scalia declared that "*Solem* was simply wrong"[178] and that "the Eighth Amendment contains no proportionality guarantee."[179]

Justice Scalia engaged in a lengthy gloss on the history of the language of the punishments clause, relying to a great degree on Granucci's article,[180] with several notable exceptions. Justice Scalia disagreed with Granucci's observation that proportionality was a traditional right and privilege of Englishmen, noting that in 1791 England over two hundred crimes were punishable by death.[181] Justice Scalia also differed with Granucci's postulate that the English Declaration of Rights embodied a proportionality principle.[182]

In any event, Justice Scalia felt that what the English intended

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[174] *Id.* at 2864; *see also* Weems v. United States, 217 U.S. 349, 382 (1910).

[175] *Harmelin*, 111 S. Ct. at 2685 (1991) (opinion of Scalia, J.); *see supra* note 122; Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980).

[176] *Harmelin*, 111 S. Ct. at 2685-86 (1991) (opinion of Scalia, J.); *see supra* note 116; *Rummel*, 445 U.S. at 274.

[177] *Harmelin*, 111 S. Ct. at 2686 (opinion of Scalia, J.) (citing Payne v. Tennessee, 111 S. Ct. 2597 (1991)). In *Payne*, Chief Justice Rehnquist, writing for the Court, asserted that the principle of stare decisis did not require strict adherence to constitutional decisions, particularly where the case was decided "by the narrowest of margins, over spirited dissents." *Id.* at 2609-10. Absent from Justice Scalia's analysis in *Harmelin* is the fact that *Rummel* was also a five to four decision over a "spirited dissent." Rummel v. Estelle, 445 U.S. 263 (1980).

[178] *Harmelin*, 111 S. Ct. at 2686 (opinion of Scalia, J.).

[179] *Id.*

[180] Granucci, *supra* note 11, at 839.

[181] *Harmelin*, 111 S. Ct. at 2691 (opinion of Scalia, J.).

[182] *Id.* at 2691 n.5.

with their punishments clause should have little if any bearing on American law if the framers meant something else in the clause they adopted.[183] Referring to Webster's 1828 dictionary definition of "unusual" as meaning "such as is not in common use,"[184] Justice Scalia determined that "by forbidding 'cruel *and unusual* punishments',"[185] the framers intended the punishments clause to "disabl[e] the Legislature from authorizing particular 'modes' of punishment -- specifically, cruel methods of punishment that are not regularly or customarily employed."[186]

Justice Scalia conceded that "the language [of the punishments clause] bears the construction . . . that cruelty and unusualness are to be determined not solely with reference to the punishment at issue

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[183] *Id.* at 2691.

[184] *Id.*

[185] *Id.* (citing Stanford v. Kentucky, 492 U.S. 361 (1989) (plurality) (affirming the death sentences imposed on 16 and 17 year-old defendants)). Justice Scalia premised his entire opinion in *Stanford* on the distinction between "and" and "or," and maintained that relief under the punishments clause could be granted only after a showing of both cruelty "and" unusualness. *Stanford*, 492 U.S. at 369-70. This rationale was followed by the *Harmelin* majority. *Harmelin*, 111 S. Ct. at 2701 ("Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense . . . ."). Notably, however, Justice Scalia has argued that "or" can mean the same as "and." *See* Honig v. Doe, 484 U.S. 305, 332 (1988) (Scalia, J., dissenting) (the "Stay-put" provision of the Education of the Handicapped Act prohibited state or local school authorities from unilaterally excluding disabled children from classrooms for dangerous or disruptive conduct growing out of their disabilities during the pendency of review hearings). *See also* George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1321 n.127 (1990).

[186] *Harmelin*, 111 S. Ct. at 2691. Several commentators have argued that imprisonment *was* a novel form of punishment to the framers, one *not* "regularly or customarily employed." Schwartz & Wishingrad, *supra* note 22, at 835-36 n.256. It was not until the nineteenth century that the American penitentiary system began to be organized, and therefore obviously did not directly concern the framers. *Id.* Jails in the seventeenth and eighteenth centuries were devoted almost exclusively to holding prisoners awaiting trial. One historian could find only nineteen cases imposing sentences of imprisonment in New York between 1691 and 1776. DOUGLAS GREENBERG, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK 1691-1776 125 n.53 (1974), *cited in* Leonard G. Leverson, *Constitutional Limits on the Power to Restrict Access to Prisons: An Historical Re-Examination*, 18 HARV. C.R.-C.L. L. REV. 409, 414 (1983). Punishments that *were* "regularly and customarily" employed by the colonials included the stocks, pillorying, branding, whipping, mutilations, scarlet lettering, and the cutting off of ears and nailing them to a board. GRAEME NEWMAN, THE PUNISHMENT RESPONSE 112-23 (1978).

('Is life imprisonment a cruel and unusual punishment?') but with reference to the crime for which it is imposed as well ('Is life imprisonment cruel and unusual punishment for possession of unlawful drugs?')."[187] He went on, however, to assert that the arguments against such a reading "seem to us conclusive."[188]

Justice Scalia's first argument was that if the framers meant to mandate a proportionality guarantee, the phrase "cruel and unusual punishment" was "an exceedingly vague and oblique way of saying what Americans were well accustomed to saying more directly."[189] Second, Justice Scalia found it "quite peculiar" for cruelty and unusualness to refer to the offense in question since the clause "[had] application only to a new government that had never before defined [any] offenses."[190] Lastly, "and most conclusively," Justice Scalia stated that his theory that the Eighth Amendment applied to the mode of punishment only, and not to its degree, was confirmed by "all available evidence of contemporary understanding."[191]

After noting that "the Eighth Amendment received little attention during the proposal and adoption of the Federal Bill of Rights,"[192] Justice Scalia declared that "[t]he actions of the First Congress . . . are of course persuasive evidence of what the Constitution means."[193] Justice Scalia then proffered the fact that the penalties provided by the First Congress for several dissimilar crimes were identical: piracy, treason, and forgery of United States securities were all punishable by death at the turn of the nineteenth century.[194]

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[187] *Harmelin*, 111 S. Ct. at 2692 (opinion of Scalia, J.).

[188] *Id.*

[189] *Id.* Compare Justice White's dissent, where he wonders where those same "plain-talking Americans" were when the Fifth Amendment's Due Process Clause and the Fourth Amendment's prohibition against unreasonable searches and seizures were drafted. *Id.* at 2710 (White, J., dissenting).

[190] *Harmelin*, 111 S. Ct. at 2693 (opinion of Scalia, J.).

[191] *Id.*

[192] *Id.* *See supra* note 44 and accompanying text.

[193] *Harmelin*, 111 S. Ct. at 2694 (opinion of Scalia, J.). *But see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), *quoted in* Justice White's dissent: "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Harmelin*, 111 S. Ct. at 2713 (White, J., dissenting).

[194] *Harmelin*, 111 S. Ct. at 2694 (opinion of Scalia, J.).

Justice Scalia went on to assert that "the most persuasive evidence" of what the punishments clause meant (and therefore, one supposes, *means*) is found in early *state* decisions interpreting comparable *state* constitutional amendments.[195] Citing twelve such state opinions spanning the nineteenth century,[196] yet ignoring the Court's own language in *Pervear*[197] as well as Justice Field's dissent in *O'Neil*,[198] Justice Scalia nevertheless determined that "judicial agreement that a 'cruel and unusual' . . . provision did not constitute a proportionality requirement appears to have been universal."[199]

Justice Scalia then reached the true purpose of his opinion: *Solem* must be overruled, primarily because the "clear historical guidelines and accepted practices that enable judges to determine which modes of punishment are 'cruel and unusual,'" do not lend themselves to proportionality analysis.[200] Disproportionate penalties only *seem* to be so, Justice Scalia felt, "because they were made for other times or places, with different social attitudes, different criminal epidemics, different public fears, and different prevailing theories of penology."[201] Then, rather than getting caught in a *Rummel*-style overtime parking footnote,[202] Justice Scalia added that "[t]his is not to say that there are no absolutes; one can imagine extreme examples that no rational person, in no time or place, could accept,"[203] apparently proposing that before the Court could find a term of imprisonment unconstitutionally excessive, a rational person *in any and/or every time or place* would have to reject it.[204] Justice Scalia

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[195] *Id.* at 2695.

[196] *Id.* at 2695-96.

[197] *See supra* notes 52-56 and accompanying text.

[198] *See supra* notes 57-65 and accompanying text.

[199] *Harmelin*, 111 S. Ct at 2696 (opinion of Scalia, J.).

[200] *Id.*

[201] *Id.*

[202] *See supra* note 122 and accompanying text.

[203] *Harmelin*, 111 S.Ct at 2696 (opinion of Scalia, J.).

[204] At first glance this standard appears to be merely a restatement of the Court's highly deferential "rational relation" standard of review. However, when considered in an Eighth Amendment framework, the phrase "in no time or place" brings to mind disturbing interpretive possibilities. Justice Scalia seems to suggest that a rational person in any historical context would have a view regarding the appropriate length of prison sentences that would *necessarily* be consonant with constitutional principles in 1991.

confidently added that "for the same reason these examples are easy to decide, they are certain never to occur."[205]

In rejecting the three *Solem* factors, Justice Scalia relied heavily on their allowing for the imposition of subjective judicial values, rather than deferring to what he saw as the more legitimate, albeit still subjective, values of the legislature.[206] In Justice Scalia's view, "[t]he real function of a constitutional proportionality principle, . . . is to enable judges to evaluate a penalty that *some* assemblage of men and women *has* considered proportionate -- and to say that it is not."[207]

Justice Scalia attacked the first factor, the "inherent gravity of the offense," by indicating the wide disparity among and within the states in their differentiation between arguably "serious" and "more serious" crimes.[208] As far as Harmelin's offense was concerned, Justice Scalia posited that the gravity of society's drug problem is a subjective determination in and of itself, and that "[t]he Members of the Michigan Legislature, and not [the Supreme Court], know the situation on the streets of Detroit."[209] In a subjective aside, and in apparent disregard of the precise offense for which Harmelin had been convicted, Justice Scalia added that mere possession of a controlled substance could not be separated from its use and distribution, since possession "facilitat[ed] distribution, subject[ed] the holder to the temptation of distribution, and rais[ed] the possibility of theft by others who might distribute."[210]

The second factor failed, Justice Scalia argued, for the same reason as the first. "One cannot compare the sentences imposed by the jurisdiction for 'similarly grave' offenses if there is no objective

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[205] *Id.* at 2696-97.

[206] *Id.* at 2697.

[207] *Id.*

[208] *Id.* at 2697-98.

[209] *Id.* at 2698.

[210] *Harmelin*, 111 S. Ct. at 2698. Harmelin was convicted of possession only. *Id.* at 2684. *See supra* note 159 and accompanying text. *But see* Carmona v. Ward, 439 U.S. 1091, 1096 (1979) ("To rationalize petitioners' sentences [for narcotics possession] by invoking all evils attendant on or attributable to widespread drug trafficking is simply not compatible with a fundamental premise of the criminal justice system, that individuals are accountable only for their own criminal acts.") (Marshall, J., dissenting from denial of certiorari).

standard of gravity. Judges will be comparing what *they* consider comparable."[211] Additionally, Justice Scalia argued that a case could be made for justifying differing punishment for "similarly grave" offenses on deterrence grounds; since the deterrent impact of punishment depends in part upon its certainty, offenses difficult to detect may warrant steeper penalties than equivalent offenses that are not.[212]

Justice Scalia believed that the third Solem factor -- the sentences imposed by other jurisdictions for the same crime -- "has no conceivable relevance to the Eighth Amendment."[213] To Justice Scalia, the perfect example of state-to-state differences in value judgments lay in the possibility that one state could criminalize what another state rewarded, as in protection being afforded an endangered species in one jurisdiction and a bounty imposed on the same animal in another.[214] "Though the different needs and concerns of other states may induce them to treat simple possession of 672 grams of cocaine as a relatively minor offense,[215] nothing in the Constitution requires Michigan to follow suit."[216]

Justice Scalia concluded by distinguishing "[o]ur 20th century jurisprudence."[217] While he conceded that *Weems* contains language that could support the theory that "mere disproportionality, by itself,

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[211] *Harmelin*, 111 S. Ct. at 2698.

[212] *Id.*

[213] *Id.*

[214] *Id.* at 2699.

[215] *Id.* In West Virginia and Wyoming, Harmelin may have received a maximum sentence of six months for the same offense. W. VA. CODE § 60A-4-401(c) (1989); WYO. STAT. § 35-7-1031(c) (1988). In the District of Columbia, Iowa, Massachusetts, Pennsylvania, Tennessee, and Wisconsin, the penalty for possession of 672.5 grams of a mixture containing cocaine is one year or less in prison, or a fine of not more than $10,000, or both. D.C. CODE ANN. § 33-541(d) (1988); IOWA CODE ANN. §§ 204.401(3), 903.1(1)(b) (West 1987 & Supp. 1990); MASS. GEN. LAWS ANN. ch. 94C, § 34 (West 1984); PA. STAT. ANN. tit. 35, § 780-113(a)(16), (b) (Supp. 1990); TENN. CODE ANN. §§ 39-17-418(a), (c), 40-35-11(e)(1) (Supp. 1989); WIS. STAT. ANN. § 161.41(3m) (West 1989). If Harmelin had been convicted in federal court, as a first offender he would have faced a maximum of one year in jail. 21 U.S.C. § 844(a) (1988 & Supp. 1990).

[216] *Harmelin*, 111 S. Ct. at 2699.

[217] *Id.*

might make a punishment cruel and unusual,"[218] he added that the opinion could also be interpreted as holding that "only a 'unique . . . punishmen[t],' a form of imprisonment different from the 'more traditional forms . . . imposed under the Anglo-Saxon system' can violate the Eighth Amendment."[219] Reasoning backwards, Justice Scalia argued that since *Weems* "did not produce a decision implementing [a constitutional requirement of proportionality] for six decades,"[220] he thought it "unlikely" to have announced one.[221] This argument seems particularly specious in light of the fact that the Eighth Amendment itself was not construed by the Supreme Court until *Pervear* in 1866, *seven* decades after its adoption.[222]

Finally, Justice Scalia characterized the proportionality principle expressly announced in *Coker* [223] and *Enmund* [224] as

> an aspect of our death penalty jurisprudence, rather than a generalizable aspect of Eighth Amendment law. . . . Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides. We would leave it there but extend it no further.[225]

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[218] *Id.*

[219] *Id.* at 2700 (quoting Rummel v. Estelle, 445 U.S. 263, 274-75 (1980)). This theory of the Eighth Amendment's applicability would support an argument that pillorying, a form of imprisonment well known to the American colonials, whereby the offender is fastened to a framework by the neck and wrists and exposed to public scorn, is constitutional. *See supra* note 186.

[220] *Harmelin*, 111 S. Ct. at 2700. Justice Scalia was presumably alluding to Coker v. Georgia, 433 U.S. 584 (1977). *See supra* notes 105-07 and accompanying text.

[221] *Harmelin*, 111 S. Ct. at 2700.

[222] *See supra* notes 52-56 and accompanying text.

[223] Coker v. Georgia, 433 U.S. 584 (1977). *See supra* notes 105-07 and accompanying text.

[224] Enmund v. Florida, 458 U.S. 782 (1982). *See supra* note 107.

[225] *Harmelin*, 111 S. Ct. at 2701.

### *ii. Justice Kennedy's Opinion*

The concurrence disregarded the historical argument and claimed to join in the judgment of the Court for stare decisis reasons.[226] Justice Kennedy acknowledged that the case history on the subject affirmed that the punishments clause encompassed a "narrow proportionality principle,"[227] one which had application to noncapital sentences.[228]

Noting the apparent tension between *Rummel* and *Solem*, Justice Kennedy nevertheless determined they yielded "common principles" which gave consistency to "the uses and limits of proportionality review."[229] The first common principle was that the setting of the lengths of prison terms had its primacy in the legislative branch, and that "[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess . . . ."[230] The second principle was that "the Eighth Amendment did not mandate adoption of any one penological theory,"[231] perhaps intimating that if a state legislature wanted to base its theories of punishment exclusively on deterrent and retributive precepts, and eliminate entirely concerns of rehabilitation or reform, it would not offend the punishments clause.[232] The third principle recognized the validity and often beneficial effect of marked divergences in state-to-state theories of punishment and lengths of prescribed prison terms.[233] Finally, Justice Kennedy recognized the principle which cautioned that proportionality review by federal courts should be informed by

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[226] *Id.* at 2702 (1991) (Kennedy, J., concurring).

[227] *Id.*

[228] *Id.* at 2703.

[229] *Id.*

[230] *Id.* at 2703-04 (quoting Solem v. Helm, 463 U.S. 275, 290 (1983)). *See supra* note 148 and accompanying text.

[231] *Harmelin*, 111 S. Ct. at 2704 (Kennedy, J., concurring).

[232] Near the conclusion of his concurrence Justice Kennedy observed that "[r]easonable minds may differ about the efficacy" of such a sentencing scheme, and that "[t]he accounts of pickpockets at Tyburn hangings are a reminder of the limits of the law's deterrent force." *Id.* at 2709.

[233] *Id.* at 2704.

"objective factors to the maximum extent possible."[234]

These subsidiary principles, Justice Kennedy wrote, informed the ultimate one: "the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime."[235]

Applying these principles to the present case, Justice Kennedy observed that while Harmelin and Helm were sentenced to the same severe penalty, "[p]etitioner's crime . . . was far more grave than the crime at issue in *Solem*."[236] Justice Kennedy rejected the notion that Harmelin's crime, like the one at issue in *Solem*, was "one of the most passive felonies a person could commit."[237] Justice Kennedy, like Justice Scalia, refused to limit his analysis of Harmelin's offense to that for which he was actually convicted. "Possession, *use, and distribution* of illegal drugs represents one of the greatest problems affecting the health and welfare of our population."[238] At issue was not merely 672.5 grams, or one and one-half pounds of cocaine, it was "between 32,500 and 65,000 *doses*"[239] of cocaine. Regardless of the fact that Harmelin's crime caused no harm to society, it *threatened* to do so.[240] Justice Kennedy went as far as to ratify the characterization of possession of a large amount of cocaine as being "as serious and violent as felony murder without specific intent to kill."[241]

As far as the *Solem* factors were concerned, Justice Kennedy highlighted the permissive nature of their wording and concluded that a comparative analysis between Harmelin's sentence and sentences imposed for other crimes in Michigan, and sentences imposed for the same crime in other jurisdictions was not necessary.[242] "Given the serious nature of the petitioner's crime,"[243] Justice Kennedy felt that

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[234] *Id.*

[235] *Id.* at 2705 (quoting Solem v. Helm, 463 U.S. 275, 288 (1983)).

[236] *Harmelin*, 111 S. Ct. at 2705 (Kennedy, J., concurring).

[237] *Id.* (quoting Solem v. Helm, 463 U.S. 275, 296 (1983)).

[238] *Harmelin*, 111 S. Ct. at 2705 (Kennedy, J., concurring) (emphasis added).

[239] *Id.* (emphasis added).

[240] *Id.* at 2706 (emphasis added).

[241] *Id.*

[242] *Id.* at 2707.

[243] *Harmelin*, 111 S. Ct. at 2707 (Kennedy, J., concurring).

the second and third prongs of the Solem test were disposable.[244]

In Justice Kennedy's view, the language in *Solem* which instructed that "no one factor will be dispositive in any given case"[245] applied only to the determination of a punishment's *un*constitutionality.[246] According to the concurrence, a punishment's passing muster under any *one* factor would suffice for a determination that the challenged punishment was constitutional.[247]

Justice Kennedy wrote that "a better reading"[248] of *Solem* and *Weems* led to the conclusion that intra- and inter-jurisdictional analyses were appropriate only for validation purposes, after "an initial judgment that a sentence is grossly disproportionate to the crime."[249] Under this analysis, and "[i]n light of the gravity of the petitioner's offense,"[250] Justice Kennedy determined that Harmelin's sentence did not give rise to an initial inference of gross disproportionality and therefore did not warrant comparative analysis.[251] Justice Kennedy's reading of those cases ignores the obvious questions that it raises: How can that initial judgment of disproportionality be "informed by objective factors to the maximum possible extent"[252] *without* intra- and inter-jurisdictional comparisons? Why would a sentence require any further analysis *after* a determination that it was grossly disproportionate to the crime? Answers are not found in Justice Kennedy's concurrence.

Aside from making a determination regarding the gravity of Harmelin's crime,[253] the concurrence engaged in no substantive analysis at all. Justice Kennedy simply slapped a "serious offense" label on Harmelin's crime and decided that the sentence was not grossly disproportionate,[254] in direct contravention of the principles

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[244] *Id.*

[245] *See supra* note 145 and accompanying text.

[246] *Harmelin*, 111 S. Ct. at 2707 (Kennedy, J., concurring).

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] *Id.*

[251] *Id.*

[252] *Harmelin*, 111 S. Ct. at 2704. *See supra* note 235 and accompanying text.

[253] *Harmelin*, 111 S. Ct. at 2706-07 (Kennedy, J., concurring).

[254] *Id.* at 2707.

set forth in the case he claimed to be relying on to do so.[255]

### *iii. The Decision of the Court*

The portion of the decision in which the five justices agreed is relatively brief. In affirming the constitutionality of Harmelin's sentence, the majority rejected the challenges based on its severe length and its mandatory operation.[256] While the Court recognized that individualized sentencing -- a separate determination that the punishment is "appropriate" -- is mandated for capital crimes, it refused to extend that entitlement to those sentenced to mandatory life without parole.[257] Harmelin's sentence lacked the irrevocability of a death sentence, since "there remain the possibilities of retroactive legislative reduction and executive clemency."[258]

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[255] In the following term, the same three justices who formed the concurrence to *Harmelin* relied once again on this jaded approach to stare decisis in order to "affirm" Roe v. Wade. Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2803 (1992). In a joint opinion, Justices O'Connor, Kennedy, and Souter maintained it was a respect for precedent that necessitated affirming *Roe*, yet they nonetheless saw no impediment to stripping the abortion right of its fundamental status and upholding a plethora of restrictions that did not appear to place an "undue burden" on the woman's right. *Id.* at 2808-2833 *passim*.

[256] *Harmelin*, 111 S. Ct. at 2701.

[257] *Id.* at 2701-02.

[258] *Id.* at 2702. Ultimately, relief to those sentenced under the Michigan possession statute came from the judiciary. On June 16, 1992, the Michigan Supreme Court struck down the no-parole feature of the penalty. People v. Bullock, 485 N.W.2d 866 (Mich. 1992).

The issue before the Michigan Court in *Bullock* was the very "and/or" distinction upon which the *Harmelin* majority rested its decision. *See Harmelin*, 111 S. Ct. at 2701 ("Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense . . . ."). The Michigan State Constitution prohibits "cruel *or* unusual punishment." MI. CONST. art. 1, § 16 (emphasis added). This difference in phrasing alone would arguably justify overturning the law, particularly in light of the fact that all nine members of the United States Supreme Court agreed that mandatory life imprisonment without parole for an offense of this type is "cruel." *See Harmelin*, 111 S. Ct. at 2701, 2709 (Kennedy, J., concurring); *id.* at 2719 (White, J., dissenting); *id.* at 2720 (Marshall, J., dissenting); *id.* at 2720 (Stevens, J., dissenting). Nevertheless, the Michigan Court applied a three pronged analysis from an earlier Michigan decision which closely resembled the *Solem* test in order to invalidate the no-parole penalty. *Bullock*, 485 N.W.2d at 877. As a result of *Bullock*, all those sentenced under the

### *III. Conclusion*

While nominally still good law, *Solem v. Helm*[259] is for all practical purposes a lame duck after *Harmelin*. As lower courts are faced with future challenges to prison sentences, they will be hard-pressed to reconcile the two cases. The spirit of the Supreme Court's decision in *Solem* acknowledged that the Eighth Amendment is "progressive and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."[260] In contrast, *Harmelin* looked resolutely backward, and proclaimed that "[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history."[261]

The proportionality test announced in *Solem* was designed to aid courts in making more objective determinations under the Eighth Amendment and to champion the equitable concerns evident in the line of cases which preceded it in interpreting the spirit of the punishments clause. With *Harmelin v. Michigan*, however, came a neat bit of constitutional prestidigitation. As seven justices asserted *Solem*'s vitality, the proportionality guarantee nevertheless vanished into constitutional thin air.

The Kennedy-O'Connor-Souter interpretation of *Solem* obliterated that decision's raison d'être. By allowing courts to overlook comparative analysis when the challenged sentence is for an offense which is "grave,"[262] and by providing drug possession as an example of a grave offense, the concurrence granted state legislatures virtual carte blanche in the assignment of terms of imprisonment.

Sentencing laws are legislative decisions, and like all legislative decisions, are subject to constitutional review. The *Solem* standard did not encroach upon legislative autonomy except insofar as it guaranteed that the power of the legislature to punish criminals

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statute, including Ronald Harmelin, are eligible for parole after serving ten years. *Id.* at 878.

[259] 463 U.S. 275 (1983).

[260] Weems v. United States, 217 U.S. 349, 378 (1910). *See supra* notes 66-87 and accompanying text.

[261] *Harmelin*, 111 S. Ct. at 2701.

[262] *Id.* at 2707 (Kennedy, J., concurring).

was exercised in compliance with the Eighth Amendment. The federal courts have an obligation under *Marbury v. Madison*[263] to do nothing less.[264] Three quarters of a century before *Solem*, the Supreme Court acknowledged similar apprehensions regarding the appearance of judicial infringement on the power of the legislative branch to set noncapital sentences, even while it asserted an identical, timeless obligation:

> We disclaim the right to assert a judgment against that of the legislature of the expediency of the laws or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought to the judgment of a power superior to it for the instant. . . . [The legislature has] no limitation, we repeat, but constitutional ones, and what those are the judiciary must judge.[265]

Contrary to Justice Scalia's assumption, the benefit which flows from proper proportionality analysis is that judges are *restrained* from placing subjective value judgments on crimes and the sentences for them, and then either affirming or overruling them. Indeed, it is the improper analysis of Justice Kennedy which best illustrates Justice Scalia's objections to a proportionality guarantee. A judge who rules on the constitutionality of a prison sentence solely on the basis of his or her own opinion regarding the gravity of the offense is the very judicial overstepping which, ironically, both Justice Scalia and the *Solem* court correctly condemn. It is only with comparative analysis that Justice Scalia and *Solem* part company.

The Eighth Amendment can serve no purpose regarding noncapital sentencing without comparative analysis. Comparative

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[263] 5 U.S. (1 Cranch) 137 (1803).

[264] *Id.* at 177. *See supra* note 193.

[265] Weems v. United States, 217 U.S. 349, 378-79 (1910).

analysis is the linchpin which ensures that the Eighth Amendment continues to "draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[266]

Justice Scalia referred again and again in his opinion to what the punishments clause *meant* rather than what it *means*. This theory of historical justification collapses, however, when applied with similar rigor to other Amendments. As Lawrence Tribe points out regarding the Fourteenth Amendment, the Court's 1954 determination in *Brown v. Board of Education*[267] that school segregation violated the Equal Protection Clause did not change the *meaning* of that Amendment, even though there is little doubt that most of its framers assumed that a doctrine of "separate but equal" was entirely consistent with the Amendment they ratified.[268]

> From its enactment the Equal Protection Clause was understood to render unconstitutional the subjugation of the entire race with the force of law. It took us longer than it should have to concede that segregating people in the public schools *amounted* to subjugating an entire race by force of law. But the basic principle remained constant.[269]

This reasoning is entirely applicable to Eighth Amendment analysis. It makes little difference what conceptions the framers labored under when they proscribed "cruel and unusual punishments" in 1791 if a mandatory sentence of life in prison without parole for a first time drug offender *amounts* to cruel and unusual punishment in 1991. One can only speculate what Justice Scalia made of these remarks of his fellow justice, written in 1976:

> The framers of the Constitution wisely spoke in general language and left to the succeeding generations the task of applying that language to the

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[266] Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

[267] 347 U.S. 483 (1954).

[268] LAWRENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 13 (1991).

[269] *Id.*

> unceasingly changing environment in which they would live. . . . Where the framers . . . used general language, they [gave] latitude to those who would later interpret the instrument to make the language applicable to cases that the framers might not have foreseen.[270]

Ironically, despite the fears of its opponents, *Solem* did not subvert the constitutional legitimacy of state legislative sentencing systems. Challenges to noncapital prison sentences under the *Solem* standard have been rejected with striking regularity in the Federal Courts of Appeals.[271]

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[270] William Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 694 (1976), *quoted in* TRIBE & DORF, *supra* note 268, at 13.

[271] *See, e.g.*, McCullogh v. Singletary, 967 F.2d 530 (11th Cir. 1992) (sentence of life imprisonment without possibility of parole for first degree burglary and sexual assault did not constitute cruel and unusual punishment); Gutierrez v. Moriarty, 922 F.2d 1464 (10th Cir.), *cert. denied*, 112 S. Ct. 140 (1991) (life sentence for distributing a minuscule amount of heroin was not cruel and unusual punishment); United States v. LaRouche, 896 F.2d 815 (4th Cir.), *cert. denied*, 496 U.S. 927 (1990) (sentence of 15 years imprisonment was not excessive for conviction of conspiracy to commit mail fraud, for committing mail fraud, and for conspiracy to defraud the Internal Revenue Service); United States v. Ramirez-DeRosas, 873 F.2d 1177 (9th Cir. 1989) (defendant's sentence of 30 months for illegal transportation of aliens did not constitute cruel and unusual punishment even though it constituted more than a six-fold departure upward from the guideline sentence); United States v. Salerno, 868 F.2d 524 (2nd Cir.), *cert. denied sub nom.* Furnari v. United States, 491 U.S. 907, *cert. denied sub nom.* Indelicato v. United States, 493 U.S. 811 (1989) (one hundred year prison sentences imposed on defendants convicted of RICO violations and extortion were not excessive); United States v. Martorano, 866 F.2d 62 (3rd Cir. 1989), *cert. denied* 493 U.S. 1077 (1990) (sentence of life imprisonment without possibility of parole imposed on defendant on his plea of guilty to charges of masterminding conspiracy to distribute drugs did not violate the Eighth Amendment); United States v. Brown, 859 F.2d 974 (D.C. Cir. 1988) (sentence of five years imprisonment with four year term of supervision to commence upon release for conviction of possession with intent to distribute cocaine base was not cruel and unusual punishment); Terrebone v. Butler, 848 F.2d 500 (5th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989) (mandatory life imprisonment imposed on 21-year-old heroin addict convicted of delivering 22 packets of heroin to undercover officer did not constitute cruel an unusual punishment); United States v. McCann, 835 F.2d 1184 (6th Cir. 1987), *cert. denied*, 486 U.S. 1026 (1988) (life imprisonment without possibility of parole imposed upon defendant convicted of conducting a continuing criminal enterprise was not excessive); United States v. Ray, 828 F.2d 399 (7th Cir. 1987), *cert. denied*, 485 U.S. 964, *cert. denied sub nom.* McChriston v. United States, 484 U.S.

One thing in *Harmelin*'s aftermath is fairly certain: The only noncapital sentence assuredly unconstitutional under an amalgam of the Scalia and Kennedy opinions is *Rummel*'s hypothetical sentence of life imprisonment for overtime parking.[272] The closer cases, and perhaps more than a few not-so-close cases, must invariably go by the wayside.

*Edward J. McGowan*[273]

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1945 (1988) (sentence of 25 years imprisonment imposed on defendant who pled guilty to 12 counts including conspiracy, mail fraud, and transmitting altered postal money orders was not excessive); Tuitt v. Fair, 822 F.2d 166 (1st Cir.), *cert. denied*, 484 U.S. 945 (1987) (sentence of life imprisonment imposed on habitual offender convicted of armed robbery did not violate Eighth Amendment); Tyler v. Gunter, 819 F.2d 869 (8th Cir. 1987) (five year sentence for possession of one eighth of one gram of hashish did not violate Eighth Amendment); United States v. Gugliemi, 819 F.2d 451 (4th Cir. 1987), *cert. denied* 484 U.S. 1019 (1988) (sentence of 25 years incarceration for interstate transport of obscene materials was not cruel and unusual punishment); McLester v. Smith, 802 F.2d 1330 (11th Cir. 1986) (life sentence without parole for robbery under habitual offender law did not violate Eighth Amendment). The author has been unable to find a single federal decision where a prison sentence was overturned under the *Solem* standard. Westlaw search, Allfeds library, Nov. 10, 1992.

[272] *See* Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980). *See also supra* note 122 and accompanying text. *But see* Justice Scalia's opinion, where he allows that such a punishment could arguably indeed be proportionate, if "overtime parking should one day become [a] major threat to the common good, and the need to deter it . . . critical." Harmelin v. Michigan, 111 S. Ct. 2680, 2697 n.11 (1991) (opinion of Scalia, J.).

[273] J.D., New York Law School, 1992. Mr. McGowan is currently an attorney with the Criminal Defense Division of the Legal Aid Society in New York City.